

ANGELINE GALBRAITH

IBLA 85-256

Decided May 6, 1987

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-14780.

Set aside and remanded; contest ordered.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments

The right of an Alaska Native allotment applicant to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), extends both to unsurveyed lands and those lands surveyed prior to enactment of sec. 905(c). This right, however, terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received or by the adoption, after Dec. 2, 1980, of a plan of survey for either the originally described or the newly described land.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments

A Native allotment applicant seeking to amend the description of land contained in his or her allotment application has the burden of establishing that the new description correctly describes the land for which he or she had intended to apply. In adjudicating such

requests, BLM is required to consider all evidence in the case file and where such evidence does not clearly establish that the new description represents the original intent of the Native, BLM may not approve the amendment.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments

Under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the implementing regulations, an allotment applicant must show substantially continuous use and occupancy potentially exclusive of others. Using land for a period of a few days each year does not constitute substantially continuous possession or use and is properly categorized as "intermittent use."

4. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Words and Phrases

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

APPEARANCES: Colleen DuFour, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Angeline Galbraith; Lance B. Nelson, Esq., Assistant Attorney General, Department of Law, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Angeline Galbraith has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated December 7, 1974,

rejecting her Native allotment application F-14780. Since resolution of this appeal requires analysis of an initial question of law, as well as application of the law to the specific facts of this case, we will first briefly sketch the facts to provide a framework for examining the legal question. Thereafter, we will explore the facts in greater detail since they are ultimately determinative of the result reached.

By an application signed August 11, 1971, and received by BLM December 16, 1971, Angeline Galbraith sought a preference right for the allotment of a parcel of land under the now repealed Native Allotment Act of 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). The Act granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. Id. Under the Act and implementing regulations, entitlement to an allotment was dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. Id.; see 43 CFR 2561.0-5(a); see also United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). 43 U.S.C. § 1617(a) (1982). The Native Allotment Act was repealed on December 18, 1971, by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 through 1624 (1982), but application pending before the Department as of the date of repeal were allowed to proceed to patent.

In her application, appellant claimed seasonal use and occupancy of the land for berrypicking and rabbit snaring since 1955. Her application did not describe the land applied for, but a note dated December 13, 1971, submitted with the application reads as follows:

Angeline Galbraith
Fairbanks (D-3) Quadrangle
Fairbanks Meridian

Beginning at latitude 64 degrees 46' 36" N., longitude 148 degrees 01' 23" W., thence S. 20 chains to corner 1, thence W. 25 chains to corner 2, thence N. 20 chains to corner 3, thence E. 25 chains to point of beginning.

Appellant asserts that the description was prepared by an employee of the Bureau of Indian Affairs (BIA) based on her pointing out on a map the position of the land she wished to claim.

On November 22, 1972, BLM issued a decision rejecting appellant's application. The decision stated that the application was for "50 acres, situated in protracted Section 36, T. 3 S., R. 3 W., Fairbanks Meridian, and more particularly described as follows," giving the same metes and bounds description as the December 13 note. The reason stated for rejecting the application was that the office records showed the tract had been withdrawn and reserved for use by the War Department by Exec. Order No. 8847, filed August 8, 1941, and was not subject to the initiation of rights under the allotment laws.

By memorandum dated January 31, 1973, BIA informed the Fairbanks District Manager that the latitude and longitude given in its decision

"does not lie within protracted section 36, T3N, R3W, Fairbanks Meridian * * * according to the USGS Fairbanks D-3 Quadrangle we have," but within "protracted section 6, T2S, R2W, Fairbanks Meridian."

A second memorandum dated November 13, 1973, stated that Angeline Galbraith had come into the BIA office in Anchorage and furnished the following description for her Native allotment application:

"Township 2 South, Range 2 West, Fairbanks Meridian, Section 6: W 1/2 SE 1/4, NE 1/4 SW 1/4 NE 1/4, S 1/2 SW 1/4 NE 1/4, E 1/2 of Lot 2. (According to USGS Quadrangle Fairbanks D-3)." By decision dated November 21, 1973, BLM vacated its previous decision and reinstated appellant's application.

A field examination of the land described in the November 13 memorandum was conducted on August 31, 1977. Although both appellant and her husband lived in Anchorage at the time, they accompanied the examiner. The examiner found that "the applicant had little knowledge of the parcel location," and that she "did not show the examiner any evidence of use or occupancy." He concluded that she had not met the requirements which would entitle her to approval of her allotment application. No action was taken at that time, apparently because there were a number of conflicting applications for allotment of this parcel and BLM desired to simultaneously adjudicate them.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371 (1980). Section 905(a)(1) provided that, with certain exceptions, Native allotment applications which were pending "on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National

Petroleum Reserve" were approved on the 180th day following the effective date of the Act. 43 U.S.C. § 1634(a)(1) (1982). Among the exceptions were those of section 905(a)(5) which provided that allotment applications were not approved but were to be adjudicated under the Native Allotment Act if within the 180 days a protest was filed by a Native corporation, the State of Alaska, or a person or entity claiming improvements on the land. 43 U.S.C. § 1634(a)(5) (1982).

Within the 180-day period two private parties filed protests against appellant's allotment application, alleging that appellant had never used the land. BLM notified them that their protests appeared to be proper under ANILCA's requirements. In addition, the State of Alaska filed a protest claiming the allotment application was for land properly selected by the State prior to the passage of ANCSA and that, therefore, the application had to be adjudicated under the requirements of the Native Allotment Act. The State's protest was summarily dismissed on the grounds that it did not assert either ownership of improvements on the land or the necessity of using the land for access to Federal and state lands, resources located on them, or a public body of water used for transportation as required by section 905(a)(5). BLM also contended that ANILCA did not authorize protests based upon state selection applications.

A second field examination was conducted June 6, 1983. The parcel examined was not that reviewed in the first examination, but rather was lot 5, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian, a parcel of 30.92 acres

located on the western boundary of the section. Appellant and her cousin, Mary McLean, were present.

In his report, the examiner noted that the:

Original application was plotted and described in error by BIA -- this error placed the parcel in conflict with allotments F-14546 (Vivian Titus) and F-14430 (Florence Keyse). Parcel has now been moved to location the applicant intended to apply for and is no longer in conflict with any adjacent allotments.

Based on his examination and statements by appellant and her cousin made during the examination, the examiner concluded that appellant had complied with the requirements of the Native Allotment Act.

Following the examination, the State of Alaska and the two private parties who had filed protests were notified of the change in the land description in appellant's application and were given 60 days to renew their protests. The private parties and the State filed new protests. The reasons noted by the State for its protest were that the land described in the application was used for an existing road, in particular that a 33-foot section-line easement existed along the western boundary of the parcel.

In response to one of the private protests filed with BLM, a supplemental field examination was conducted on January 13, 1984. As alleged by the protestant, the examiner found that a 60-foot wide dirt and gravel runway extended approximately 250 feet into the southwest portion of the parcel. He also noted that from the end of the runway a dirt road ran approximately 300 feet to connect with an access road on private property. Additionally he found that the parcel was crossed by a 900-foot long power transmission

line running from the southwest corner of the parcel to its eastern boundary on a line roughly parallel to the runway. The examiner concluded that because the airstrip had been built on Federal lands without authorization and did not predate the Native allotment, the protest should be dismissed and the application processed to certification.

BLM issued an initial decision on June 13, 1984. It first found that, due to the protests which had been filed, the application was not legislatively approved under ANILCA but required adjudication under the Native Allotment Act. It noted that the State's claimed section-line easement was not a matter for adjudication by BLM but by State court. In regard to the airstrip, BLM found that although its construction and maintenance indicated less than exclusive use and occupancy of the land by appellant, the area of nonexclusive use was less than one-fourth of the parcel. Based on the provisions of 43 CFR 2561.0-8(b) which provides that substantially continuous use and occupancy of a significant portion of the smallest subdivision of the public land survey entitle an applicant to the full subdivision, BLM concluded that the airstrip would not prevent approval of the allotment. BLM concluded, however, that appellant had not met the requirements of the Native Allotment Act and, therefore, held her application for rejection.

BLM's decision was premised on two separate lines of analysis. First, the decision noted that on March 16, 1964, the State of Alaska had filed a general purposes selection application, F-031959, for all available lands within T. 2 S., R. 2 W., Fairbanks Meridian. The lands within lots 4 and 5 were not then available as they were included within an allowed homestead

entry, F-026885. This entry was closed on April 13, 1967, notice of which was posted the following day. The State amended its application to include all available land on June 16, 1972. Since, as of this date, there was no Native allotment application describing the land in lots 4 and 5, the District Office concluded that the State selection properly attached to the land.

This fact was deemed of critical importance to appellant's application since the record indicated that her use and occupancy had been intermittent from 1968 (when she moved to Anchorage) to the present. The District Office noted that this Board had held in United States v. Flynn, *supra*, that the right to a Native allotment vests only upon the completion of 5 years' use and occupancy of the land and the filing of an application therefor. Thus, where qualifying use and occupancy of a parcel of land ceases prior to the filing of an allotment application, the right to the allotment also terminates, regardless of the subjective intent of the Native. Since intermittent use is, by definition, not qualifying use (see 43 CFR 2561.0-5(a)), the District Office held that the 1972 amendment of the State selection application segregated the land and prevented allowance of the allotment.

Independent of the above analysis, the District Office held the allotment application for rejection for another reason. The basis cited was the Board's decision in Andrew Petla, 43 IBLA 186 (1979), 1/ which had

1/ Actually, there was no majority opinion in the Petla case. The language cited in the text was from the lead opinion which represented the views of only a plurality of the Judges.

held, in accord with Secretarial Instructions of October 18, 1973, that amendments of an allotment application which result in the relocation of the allotment will not be accepted "unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams." Id. at 193 (emphasis supplied). Emphasizing the underlined phrase, the District Office noted that, inasmuch as lot 5 had been surveyed in 1919, no amendment could be permitted, as any misdescription could not have resulted from the inability to properly locate the land sought on a protraction diagram.

While the decision held the allotment application for rejection, it also afforded appellant 60 days in which to dispute any material facts. Appellant submitted affidavits from herself, her former husband, Peter Galbraith, and her cousin, Mary McLean. Peter Galbraith's statement averred that he recalled that appellant "used to set snares for rabbits during the winter and pick berries during the late summer on the land. She continued to use the land in this manner while we were married and until the late 1970's." 2/

On December 16, 1984, BLM issued a notice declaring appellant's Native allotment application rejected. The notice again stated that due to the protests which had been filed, the application was not automatically approved

2/ We would note that Peter Galbraith's statements with respect to the land actually used is necessarily secondhand information since appellant, in her affidavit, stated that "even while we were married, Peter did not go with me when I picked berries and gathered food on the land" (Exh. 12 to Statement of Reasons at 2).

under section 905(a)(1) of ANILCA but was required to be adjudicated under the Native Allotment Act. Based on its review of appellant's application, in light of the affidavits submitted, BLM found that she met the use and occupancy requirements of the Act. ^{3/} However, it found that the application for lot 5 could not be approved because the final proviso of section 905(c) of ANILCA, which stated that "no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment" (43 U.S.C. § 1634(c) (1982)), limited amendments of allotment applications to unsurveyed lands. BLM also noted that, inasmuch as the lands claimed had been surveyed since 1919, appellant could not show that the error in the original description resulted from the inability to properly identify the site on a protraction diagram.

While the land status of lot 5, the history of appellant's application, as well as BLM's decision raise numerous legal questions and issues, our review is limited to those necessary to dispose of the case. On appeal, both appellant and the State of Alaska have addressed BLM's interpretation of the final proviso of section 905(c) as excluding amendments for surveyed lands. The second and third provisos of 43 U.S.C. § 1634(c) (1982) state:

Provided further, That the Secretary may require that all allotment applications designating land in a specified area be amended, if at all, prior to a date certain, which date

^{3/} Apparently, appellant's affidavits had convinced the District Office that her use of the land had not been intermittent during the period between 1968 and the date of her application, thus avoiding the United States v. Flynn rule. See discussion, infra.

shall be calculated to allow for orderly adoption of a plan of survey for the specified area, and the Secretary shall mail notification of the final date for amendment to each affected allotment applicant, and shall provide such other notice as the Secretary deems appropriate, at least sixty days prior to said date: Provided further, That no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment. [Emphasis in original.]

In advancing an interpretation of this language, both sides have quoted portions of a passage of the House-Senate Conference Committee report on ANILCA. It states:

A significant percentage of Alaska Native allotment applications do not correctly describe the land for which the applicant intended to apply. Technical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams, are subject to correction under authority of Section 905(c). In accordance with the Department's existing procedures for the amendment of applications, subsection (c) requires that the amended application describe the land the applicant originally intended to apply for and does not provide authority for the selection of other land. * * *

In the interest of finalizing plans of survey for Native village and regional corporations, the Secretary, following the required notice, may set a deadline for amendment of applications in a designated area. Allotment applications may not be amended for location following the adoption by the Department of a final plan of survey for the area in which the allotment as originally described or as it would be amended is located.

S. Rep. No. 413, 96th Cong. 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5230.

In her statement of reasons, appellant contends that under subsection 905(c) an amendment is proper whenever the new description designates the land for which an applicant intended to apply, regardless whether the land newly described has been surveyed. She argues that the subsection's final proviso pertains to the second and preceding proviso permitting the Secretary of the Interior to set a deadline for amending applications in a designated area. The State of Alaska, on the other hand, argues that "diagrams" in the legislative history quoted above refers to protraction diagrams of unsurveyed townships and that "existing procedures" refers to an earlier Secretarial guideline limiting amendments to those based on an error arising from the inability of the applicant to properly identify land on a protraction diagram. Thus, the State supports BLM's conclusion that the final proviso of subsection 905(c) applies only to unsurveyed land.

We do not find the contentions of either party to be persuasive. Nothing in either subsection 905(c) or the legislative history cited to us supports appellant's conclusion that the final proviso pertains only to the preceeding one. Indeed, such a reading makes the final proviso unnecessary. The second proviso grants the Secretary authority to set a deadline for amending all allotment applications in a designated area by notice mailed to them at least 60 days prior to the deadline. The purpose stated in the statute for this procedure is to allow orderly adoption of a plan of survey. The legislative history, in turn, indicates that the purpose of the survey would be to identify lands to be conveyed to Native village and regional corporations. Amendments to allotment applications made after procedures for adoption of a plan of survey have been established would require

changes in the plan and could necessitate additional survey work, thereby delaying conveyances, as well as causing additional expense for the Department. In order to expedite conveyances by promoting administrative efficiency, the Secretary was given authority to set a deadline cutting off the amendment rights of applicants for allotments within an area. In such a case, however, the third proviso would have no application because the right to amend would be terminated prior to the adoption of a final plan of survey.

[1] On the other hand, we are not persuaded that the right to amend recognized by the initial language of section 905(c) is limited to unsurveyed lands. No such restriction appears in the statute. As quoted above, Congress was aware that many applications did not correctly describe the land the applicants wished to acquire. The legislative history also indicates that correction of technical errors by amendments was to be permitted under the provision. While we agree that "diagrams" most likely refers to protraction diagrams, we do not believe that the reference, or the sentence of which it is part, indicates an intent to prohibit all amendments under subsection 905(c) where the land had been surveyed prior to the filing of the application. Indeed, if this were the standard, it is impossible to understand how BLM could have permitted Mary C. McLean, appellant's cousin, to amend her description to embrace lot 4, sec. 6, since that land was also surveyed prior to her application and the third proviso prohibits amendments following adoption of a final plan of survey "which includes the location of

the allotment * * * as desired by amendment." Yet, as we shall show, infra, BLM correctly permitted the amendment and then proceeded to issue the certificate of allotment to McLean (see F-14796). 4/

We interpret section 905(c) as follows. First, an amendment of a Native allotment application describing different lands is permissible only where the new description embraces the lands originally sought. See Tukle v. Hodel, No. A85-373 (D. Alaska April 7, 1987). Second, no amendment of an allotment application is allowable in a specific area beyond a date selected by the Secretary after giving at least 60 days notice, regardless of whether or not the application describes the lands originally sought, and independent of the actual adoption of a plan of survey. Third, where a plan of survey is adopted subsequent to the enactment of ANILCA, the adoption of such plan of survey cuts off the right to amend the application. In the instant case,

4/ The fact that McLean filed her amendment prior to the passage of ANILCA is of no moment. As both the legislative history and the Fairbanks District Office noted, Congress was essentially ratifying the Department's existing procedures. While it is true that cases such as Andrew Petla, supra, spoke of difficulties in determining the precise location of land on protraction diagrams, we are aware of no cases in which the Department held, as a matter of law, that post-ANCSA amendments were prohibited, regardless of whether or not an applicant could show that an error had been made, if the land had been surveyed. While the decision in Edith Szymyd, 50 IBLA 61 (1980), did note that because the land had been surveyed before the filing of the application the error in description could not have arisen because of an inability to properly identify the situs on a protraction diagram, the decision also noted that "[i]t has not been shown in either case that the reason new lands were applied for was an inability to properly identify the occupied parcel on the original application." Id. at 63. This formulation was the ultimate standard which determined the permissibility of an amendment. Obviously, where an applicant has applied for land which was surveyed and then seeks to change the location of that land, such an applicant may have a more difficult problem proving that there was an error in the original application. But, we do not believe that such attempts were totally foreclosed under pre-ANILCA procedures.

since there has been no notice by the Secretary closing the area to further amendment, nor any plan of survey adopted subsequent to ANILCA, amendments to Native allotment applications may be permitted provided the allotment applicant establishes that the new description describes the land originally intended to be claimed. Pedro Bay Corp., 78 IBLA 196, 201 (1984).

[2] That an applicant contends his amendment describes the land originally intended does not, of course, settle the matter. Rather, the question of intent must be determined based on the facts and circumstances reflected in the record. Relevant to the question of intent are the geographic positions of the land described in the original application and the proposed amendment, the relation of the parcels to each other and to any landmarks or improvements, the history of the legal status of the parcels, and the reasons why the original application did not correctly describe the intended land. See Pedro Bay Corp., supra. Moreover, an applicant should show how his or her activities since filing the application have been consistent with the present claim that other land was intended. Such factors should clearly indicate a reasonable likelihood that the land described by the amendment was the land intended to be claimed at the time of the original application.

In the instant case, BLM determined that appellant had used and occupied the land in conformity with the 1906 allotment Act, but did not make a specific finding that she had intended to file for lot 5. The State of Alaska argues that appellant has not shown that she originally intended to

apply for lot 5 and, therefore, the amendment should be rejected. Appellant argues that BIA consistently misdescribed the parcel for which she intended to apply and breached its fiduciary duty to Alaskan Natives by failing to properly assist her in making her application. Our review of the record, as we shall show, convinces us that there is substantial room for doubt that appellant originally intended to apply for lot 5. Moreover, even if it is established that such was her original intent, we do not believe that the record as it presently exists justifies BLM's determination that her alleged use constitutes substantial use and occupancy. Accordingly, we will set aside not only BLM's rejection of the amendment but also its finding of compliance with the 1906 Act. On remand, BLM will initiate a contest of appellant's application, under the standards we delineate herein, to determine whether appellant can establish an original intent to apply for the land in lot 5 and, assuming the first question is answered in the affirmative, qualifying use and occupancy of that tract. See Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). See also Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). We turn now to a consideration of those facts which impel us to our determination.

When appellant originally filed her application with BIA, she was accompanied by her cousin, Mary C. McLean. Both have consistently insisted, and the record tends to support this assertion, that they had intended to apply for adjacent parcels of land. It is important, therefore, to examine both applications in tandem.

Appellant's application originally described a rectangular parcel of land as follows:

"Beginning at latitude $64^{\circ}46'36''$ N., longitude $148^{\circ}01'23''$ W., thence S. 20 chains to corner 1, thence W. 25 chains to corner 2, thence N. 20 chains to corner 3, thence E. 25 chains to point of beginning."

(Emphasis supplied). McLean's description was as follows: "Beginning at latitude $64^{\circ}36'28''$ N., longitude $148^{\circ}03'48''$ W., thence S. 20 chains to corner 1, thence W. 20 chains to corner 2, thence N. 20 chains to corner 3, thence E. 20 chains to point of beginning." (Emphasis supplied.) Given 10 minutes of separation, the applications could clearly not be adjacent. What obviously happened was that the BIA officer made a typographical error in the McLean description entering 36' instead of 46'. If this correction were made, the two parcels would abut along McLean's east line and appellant's west line.

This typographical error by BIA was subsequently exacerbated by a plotting error of BLM. In plotting the McLean description, BLM correctly noted that, as described, it embraced land in sec. 36, T. 3 S., R. 3 W. In plotting appellant's description, however, BLM erroneously plotted the land in sec. 30, T. 2 S., R. 2 W. Thus, because of a combination of misdescription by BIA of the McLean application and misplotting by BLM of the Galbraith description, both were placed in areas within a bombing and gunnery range, established in 1941. Accordingly, by decisions dated November 21 and 22, 1972, both applications were rejected. 5/

5/ BLM compounded its original misplotting error with respect to the Galbraith application by misdescribing its own misplotting in its decision rejecting the Galbraith application. Thus, the decision erroneously stated that the Galbraith parcel was in sec. 36, T. 3 N., R. 3 W., which was where BLM had plotted McLean's parcel, not that of appellant.

Subsequent to their rejections, BIA sent separate memoranda, both dated January 31, 1973, to BLM. These memoranda show that BIA recognized two different sources of error. Thus, with respect to appellant's application, BIA correctly noted that BLM had misplotted the allotment:

Subject application was to be rejected on November 22, 1972; however, we would like to point out the possibility of a description error. The Latitude of 64°46'36" N and Longitude 148°01'23" W does not lie within protracted section 36, T3N, R3W, Fairbanks Meridian, at least according to the USGS Fairbanks D-3 Quadrangle we have. These latitude and longitude appear to be correct; however, we show the parcel as lying in protracted section 6, T2S, R2W, Fairbanks Meridian. This area is on the Northwest side of the Tanana River. Please review this application. Thank you. [Emphasis supplied.]

Insofar as the McLean application was concerned, however, BIA recognized that its description was inaccurate. Accordingly, it requested that the description be amended to read as follows:

Beginning at a point which is corner no. 3 of the Angeline Galbraith tract and which point is at latitude 64°46'36" N, Longitude 148°02'01", thence south 20 chains to corner no. 1 of this tract; thence west 20 chains to corner no. 2, thence North 20 chains to corner no. 3, thence East 20 chains to the point of beginning. Said parcel containing 40 acres M/L.

Two subsequent notes to the McLean file by BLM officials noted that, since the land described in the amendment was surveyed, it would properly be described as lot 4, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian. By memorandum dated April 3, 1974, the BIA Realty Officer in Fairbanks concurred that this was the proper description of McLean's desired land. This memorandum also noted that there appeared to be a number of conflicts between

Native allotments in the area and suggested that as many applicants as possible accompany the field investigator.

Had no further changes been made in appellant's application, her application would have remained adjacent to McLean's on the east. One problem, however, was that lot 3 (the easterly adjacent parcel) was, in fact, patented land. Whether this fact had any effect on what subsequently transpired is impossible to say. What is clear is that on November 16, 1973, the BIA Realty Office in Fairbanks received a memorandum from the BIA Realty Officer in Anchorage concerning the location of appellant's claim. In this memorandum, the Anchorage Realty Officer stated:

Angeline Galbraith came into our office today and furnished the following description for her Native allotment application:

Township 2 South, Range 2 West, Fairbanks Meridian Section 6: W
1/2 SE 1/4, NE 1/4 SW 1/4 NE 1/4, S 1/4 SW 1/4 NE 1/4, E 1/2 of
Lot 2.
(According to USGS Quadrangle Fairbanks D-3).

This land is adjacent to Mary McLean's Native allotment according to Mrs. Galbraith.

We are pleased that we could help you on this case.

In transmitting this memorandum to BLM, the Fairbanks Realty Officer obliquely noted, "It appears, however, that there is a breakdown of communications between the individuals and the map plotting. We do not feel there are conflicts on the ground and recommend that the individuals be contacted when Bureau of Land Management makes a field check." The problem which the Realty Officer referenced was the fact that, as now described, appellant's

allotment application totally conflicted with two other allotment applications (F-14430 (Florence Keyse) and F-14546 (Vivian Titus)). Moreover, appellant's "amendment" resulted in increasing the amount of land embraced from 40 acres to 130 acres, radically altering the shape of the land sought from a rectangle to an elongated polygon. Finally, while both McLean and Galbraith agreed that they had used adjacent land, their allotment applications no longer abutted, being now separated by the patented lot 3 and the W 1/2 of lot 2, which was also patented.

As noted above, on August 31, 1977, a field examination of the "amended" claim was conducted. Both appellant and her husband were present. The field report notes that appellant denied ever seeing either of the other allotment applicants on the land when she was picking berries. In her original application, appellant had stated she used the land for berrypicking and rabbit snaring. In recommending that the application be rejected, the examiner noted:

In conclusion the examiner found the applicant had little knowledge of the parcel location, because her husband gave all directions, including walking over parcel. The applicant did not show the examiner any evidence of use or occupancy. Applicant claimed she had been out several days before and picked all of the berries. The berry picking area shown to the examiner had not been picked. The only area shown for berry picking was in a powerline Right of Way. These were high bush cranberries, which will grow after an area has been cleared. Other areas walked were or are not conducive to berry growing until cleared of the heavy Spruce growth, the applicant could not show evidence where she had snared rabbits. No trails for snaring rabbits were shown the examiner. No photographs were taken because there was nothing to photograph.

No further action was taken on this case until after the passage of ANILCA. As we noted earlier, various protests to allowance of this allotment were filed, thereby preventing automatic approval of the allotments pursuant to section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982). In response to these protests, appellant submitted three witness statements attesting to her use of the "amended" parcel. We must note that in describing the land which appellant used, all three individuals submitted a sketch which bears absolutely no resemblance to either the rectangle originally described, the elongated polygon described in the 1974 amendment, or the rectangular lot 5, which is presently being sought before this Board.

Appellant's claim was reexamined by a BLM realty specialist on June 7, 1983. This report, for the first time, located the land which appellant sought as lot 5, T. 2 S., R. 2 W. This report asserted that the "parcel was plotted in error by BIA." The report noted that in addition to berrypicking and rabbit snaring as alleged in the original application, appellant stated that she also used the land for firewood gathering and picking punk, as well as occasional hunting. The examiner noted that resources were present to support the applicant's claimed use. The report expressly noted that there were "no powerlines or pipelines on the parcel." The field examiner concluded that: "Based upon the evidence obtained during the field exam with the applicant present and the testimony of the applicant and her cousin - Mary McLean, I conclude that the applicant has complied with the Native Allotment Act of 1906, as amended."

On July 13, 1983, the District Officer provided the protesters with notice of the changed situs of appellant's allotment application as required by section 905(c) of ANILCA. Protests were filed with respect to the newly amended location, thereby necessitating adjudication under the 1906 Act. Moreover, one of the protestants alleged that part of lot 5 contained a portion of an airplane runway. A subsequent field examination, conducted on January 13, 1984, disclosed that the runway did, indeed, extend 250 feet onto lot 5. Additionally, a powerline, constructed in the 1950's, was also discovered, which crossed the entire allotment on an east to west route. The examiner concluded, however, that the protests should be rejected as the runway had been constructed on Federal land without authorization.

As noted above, the decision of June 13, 1984, held the allotment application for rejection based on two independent grounds. First, the District Office held that appellant's qualifying use had ceased 3 years prior to application and thus, the right to seek an allotment of that land ceased at that point. Second, it held that the amendment could not be allowed because the land was surveyed. BLM afforded appellant 60 days in which to submit additional information.

Three affidavits were submitted - one by appellant, one by her former husband, and one by her cousin, Mary McLean. Based on these three affidavits, BLM concluded both that appellant had originally intended to apply for lot 5 and that her use had been substantial and potentially exclusive of others. As we shall show, examination of these affidavits, in light of the other documentation in the file, supports neither of these conclusions.

Before examining these affidavits in detail, we wish to underline certain points. First, a Native allotment applicant, no less than any other public land claimant, is required to establish compliance with the applicable laws and regulations. See United States v. Bennett, 92 IBLA 174, 179 (1986); Pedro Bay Corp., 88 IBLA 349, 354 (1985); Mildred Sparks, 42 IBLA 155 (1979). Thus, as an initial matter, it is the applicant's obligation to establish her entitlement to an allotment of the land. Where this is not done, BLM is required to provide an allotment applicant with notice and an opportunity for a hearing at which the applicant may attempt to show compliance. See Donald Peters, supra. In determining whether a contest is necessary, it is BLM's obligation to examine the entire record to ascertain whether an allotment applicant has shown entitlement to the land by a preponderance of the evidence. See generally State of Alaska, 85 IBLA 196 (1985). Where entitlement has not been established, a contest complaint properly issues. Viewed under these standards, the decision of the District Office is simply inadequate.

It is clear that the District Office gave credence only to appellant's most recent assertions of use and occupancy, virtually ignoring considerable conflicting evidence submitted both by third parties, as well as appellant herself. Moreover, the decision ignores inherent inconsistencies within the affidavits which appellant submitted. Finally, even if these affidavits are taken at face value, they clearly do not establish entitlement to an allotment.

Because of the obvious weight which the District Office accorded to these affidavits, we will closely analyze their contents. The affidavit of Angeline Galbraith consists of 11 numbered paragraphs. In paragraph 1

appellant avers that she was born in Koyukuk, Alaska, and has lived in Anchorage since 1964. 6/

Paragraph 2 provides:

2. I filed an application for a Native Allotment on August 11, 1971. The land which I used for subsistence is located south of Potter Creek Road off, what is now called Rosie Creek Road, near Fairbanks. At the time I began using the land the road was unnamed.

While it is true that lot 5 lies south of Potter Creek road, both the land originally described and the land described in the 1973 amendment are also south of Potter Creek road. Appellant next avers:

3. Over the years, after I filed my application, there has been a great deal of confusion about the location of the land that I intended to apply for. I believe that the BIA office made a mistake on the original description and I have been trying to correct it ever since.

While there is certainly evidence as to a continuing controversy as to the situs of the land which appellant desires, there is virtually no evidence that appellant had been trying to correct it "ever since." Indeed, as will be seen, appellant admits that when she went out on the 1976 field examination, she never informed the field examiner that they were looking at the wrong land, even though she now avers that she realized it was not the land which she used.

6/ We note that this date contradicts a statement in the June 1983 field report that appellant moved to Anchorage in 1968, but verifies a statement made in the September 1977 field report.

4. I first began using the land that I intended to file for in 1955. I picked high bush cranberries, salmon berries, and blueberries on the land. I set snares for rabbits and hunted spruce hen. I also gathered punk which grows on the trees, and is used by the old Indians for nose snuff. I would go up to the land every summer and stay several days. I never saw anyone else in the area except Mary McLean.

The import of the above statement seems clearly to have been lost in the District Office. Here, appellant apparently admits that she spent only several days each year on the land. Yet, the District Office found that she had shown substantially continuous use and occupancy potentially exclusive of others. 7/

5. At the time that I filed for my allotment I was married to Peter Galbraith. I married Peter Galbraith in 1964. Peter was not too familiar with the location of my land. I used my Native Allotment long before I met him. In fact, even while we were married, Peter did not go with me when I picked berries and gathered food on the land.

While that statement may serve to explain why her husband monumented the wrong lands in 1977, it also undercuts any reliance on her husband's affidavit corroborating her use of lot 5.

6. I recall that in 1971 I went to the BIA office in Fairbanks with my friend Mary McLean to file for a Native Allotment. We both had used land in the same area. The parcel of land which I used was near the land that Mary had used. There

7/ This statement may also clarify a consistent confusion as to exactly when appellant's claimed use and occupancy began. In her original application, the front side alleges use and occupancy commencing in July 1955, whereas the back side places the commencement of occupancy in July 1953. The 1953 date appears in all documents until the 1983 field examination, including the 1977 field report and the witness statements submitted on behalf of appellant in 1981. From the 1983 report onward, however, 1955 is given as the year that use and occupancy commenced.

was a man at the BIA office who helped us fill out our applications. Neither Mary nor I could read maps so he pointed out the areas which were open. I remember telling him that the land that I wanted was off Rosie Creek Road.

As noted above, this really does not support a conclusion one way or the other since all of the parcels involved are "off Rosie Creek Road."

7. A short while later BIA moved my allotment because they said that they had mistakenly placed my allotment in an army gunnery range. I again explained that the land which I used and intended to apply for was located off Rosie Creek Road, next to Mary McLean's allotment.

The assertion that BIA moved her allotment is simply not supported by the record. It is clear BIA did not believe they had placed appellant's allotment in an army gunnery range. Unlike the McLean application in which there was a clear scrivener's error, the original description filed with appellant's application described land outside of the gunnery range. BLM made a mistake in plotting. The Fairbanks BIA office informed BLM of this BLM error in its memorandum of January 31, 1973. The change in the description of the allotment was apparently initiated by appellant in November 1973, when she went to the Anchorage BIA office. When the Anchorage office, BIA, transmitted the new description to the Fairbanks office, BIA, the Fairbanks office immediately realized that there was a problem in the description as it now described the same land sought in two other allotment applications. Because the Fairbanks office was concerned with this problem it requested that the applicants be contacted when BLM made its field examination. 8/

8/ It is important to note that it was not until the July 30, 1974, policy statement by the Assistant Secretary that Native allotment applicants were routinely contacted prior to the performance of a field survey.

8. BIA then sent me a copy of a map showing the location of my allotment. The map placed my allotment in Lot 2 Section 6, T. 2S, R.2W. I still did not understand the map, so I was not sure whether it was the right land. I gave the BIA map to my husband so that he could post the corner markers; Peter just followed the map.

This statement is partially corroborated by a letter from one of the protestants, dated August 29, 1977, in which she recounted meeting Mr. Galbraith who was trying to identify the land claimed from a map, which the protestant noted "was not too accurate."

9. A couple days later a fellow from BLM contacted me and said that he was going to examine the land. When we got up there, I realized that this was not the land that I used, but I was afraid to tell him that it was wrong because I thought that I would never get any land after all this trouble. There had been so much confusion already about the land that I did not want to risk losing my allotment.

This is a particularly troubling admission by appellant. In this statement, she admits that from the date of the field examination onward, she knew that she had never used or occupied the land described in her application but declined to inform BLM of this fact because "she did not want to risk losing" her allotment. Moreover, the field report declares that appellant positively denied ever having seen either of the other Native claimants using the land. While this was technically true, since by her own admission she had never used the land, the effect of such a declaration was to impugn assertions by the other claimants which, for all appellant knew, were accurate.

It is possible, of course, that the shock of her discovery that she had never used the land described in her application led to her silent acquiescence. But what is unexplained is why, later, after she had had time to reflect upon the fact that her claim was for land to which she had absolutely no right, she did not take steps to correct the record. On the contrary, in 1981, three witness statements were submitted in her behalf, one by Mary McLean, all asserting that they are aware of the land for which application was made and that appellant had used that land. At the time of the submission of these statements, appellant knew, as an irrefutable fact, that they were false. Yet no action was taken to apprise BLM of this until 1983, when the Fairbanks District Office was attempting to resolve a number of conflicting applications.

10. Last year another fellow from BLM contacted me. His name was Scott Eubanks. He said there were problems with several Native Allotments in that area. He asked me if my allotment was in the right place. I told him about the confusion regarding the location of my land and how I originally wanted land further south near Rosie Creek Road. I told him that I had intended to apply for my land next to Mary McLean. Mr. Eubanks informed me that my land was not adjacent to Mary's. I said that I never wanted the land where BIA and BLM put me. Mr. Eubanks corrected the location placing my allotment in Lot 5 next to Mary McLean's. I showed Mr. Eubanks the areas where I picked berries and gathered food for many years. I walked all over that land and I am certain that it is the land that I originally intend to apply for.

While this statement is generally self-explanatory there are certain inconsistencies in it. Thus, lot 5 is not south of the land examined in 1977, but west. When appellant asserts that she had "never wanted the land where BIA and BLM put me," this is not really corroborated by her actions up

to that point in time, since she was clearly willing to accept an allotment of the lands as described in the 1973 amendment. She also stated that she walked all over the allotment with the field examiner. Yet the record is quite clear that Eubanks failed to notice either the runway or the powerline.

Paragraph 11 merely states that the allotment is now in the right place, that she continues to use this land during the summer and presently has a garden on it.

An affidavit was also submitted by Peter Galbraith. This affidavit also consisted of 11 numbered paragraphs. In the first four, Peter Galbraith states that he married appellant in 1964 and since that year has lived in Anchorage, that they were presently separated and had filed for divorce, that he was aware that there was a controversy as to the location of the land for which appellant had applied, and that she had informed him, before they were married, that she had used the land. The affidavit continued:

5. I first met Angeline in 1961. She was using the land at that time. I recall that she used to set snares for rabbits during the winter and pick berries during the late summer on the land. She continued to use the land in this manner while we were married and until the late 1970's.

While this statement corroborates appellant's assertions that she picked berries and set snares for rabbits, it is clearly not probative of where appellant performed these activities since appellant's own affidavit asserts that Peter Galbraith never accompanied her to the land.

6. I was not present at the time that Angeline actually filled out her application for the land. All I remember that she and Mary McLean went together to file for land and that Angeline wanted to get land adjacent to Mary's land. Angeline stated that she and Mary had always used land near each other.

That this was the original intent does seem firmly established in the record.

7. Angeline indicated that the land description which BIA gave her was not the land that she actually used and wanted to apply for. I believe that Angeline was told that the land she originally intended to apply for was not available.

At this point, Peter Galbraith's affidavit begins to diverge from that of appellant. As further review of the other parts of the affidavit make clear, the placement of this paragraph indicates that appellant was aware that she had not used the land described in her allotment application prior to the 1977 field examination. Moreover, this statement implies that appellant agreed to the original amendment because the land which she intended to apply for was not available. This clearly contradicts appellant's assertion that BIA had moved the allotment because they had mistakenly placed it in an artillery range.

8. A couple of days before the field examination in 1977 I went up to the land with Angeline and posted corner markers according to the legal description which she got from BIA.

In this paragraph, Peter Galbraith asserts that appellant accompanied him when he monumented the claim. If this is true, it contradicts the clear inference from appellant's affidavit that she had not accompanied him (see

paragraph 8, supra) and totally destroys appellant's assertion that she did not realize that the land described in her application was not the land she used until the field examination took place (see paragraphs 8 and 9, supra).

9. I went on the field exam and pointed out the corners which were marked. Neither Angeline nor I really said much to the examiner. At the time I understood that Angeline wanted to get the land but that the land she really used and wanted was not available.

This supports the fact that no attempt was made to apprise the field examiner of a mistake and actually supports the conclusion that appellant was willing to accept the land as described in the November 1973 amendment.

The last two paragraphs of the Peter Galbraith affidavit note that he was recently informed that appellant was attempting to correct the description and obtain the land she originally intended to apply for and that, to the best of his knowledge, this was lot 5. This last statement, however, is worthy of no weight since it seems undisputed that Peter Galbraith was never actually on lot 5.

Another affidavit was filed by Mary McLean in which, after recounting some of the difficulties she had with her allotment application, she states that she knows that appellant's Native allotment should be lot 5, not lot 2. Any weight which might be accorded this assertion is clearly diminished by the fact that 3 years earlier, McLean had submitted an affidavit attesting to appellant's use of the land described in the 1973 amendment, including lot 2.

Even if this was the extent of the evidence, it would be difficult to fathom how BLM could conclude either that appellant had intended to apply for lot 5 or that the use and occupancy requirements of the 1906 Allotment Act had been met. Yet there are also a number of witness statements by the protestees claiming never to have seen appellant on the land. While clearly germane, it would appear that no credence whatsoever was accorded these statements. Why this was so is totally unexplained.

The conclusion most supportable by the record is that appellant sought to apply for the parcel immediately east of lot 4; i.e. lot 3; that she was subsequently informed (correctly) that the land was not available since it was patented; that she agreed to move her claim further east to the E 1/2 lot 2 and lands immediately south, lands which were not shown to be unavailable; 9/ and that it was not until 1983 when she was approached by the field examiner who was clearly interested in settling the many conflicts in the area, that she became aware of the fact that lot 5 was available 10/ and switched her intent from acquiring the land as described in the 1973 amendment to the land in lot 5.

It may be that the above scenario contains errors. What is impossible to understand is how BLM could, faced with all of the contradictions manifest in this record, blithely determine that the land in lot 5 was the land appel-

9/ Since this change occurred in the Anchorage BIA office, the officials there were probably not aware of the two existing Native allotment applications seeking the same parcel.

10/ Indeed, by this time it was the only piece of land in all of sec. 6 that was neither patented nor claimed by a Native allotment applicant.

lant always intended to apply for, without making an even minimal attempt to resolve the discrepancies. Counsel for appellant's assertion on appeal that "the incompetence or total lack of concern of the Department is demonstrated by the fact that the BIA consistently misdescribed Ms. Galbraith's allotment contrary to her intent and instruction that her land was located adjacent to Mary T. McLean" can only be viewed with incredulity given appellant's total failure for 6 years to even suggest that the land described was not land which she used, even though, she now alleges, she knew this to be the case during this entire period. BLM's plotting error in this case and BIA scrivener's error in the McLean allotment pale in comparison to the consistent pattern of disinformation on behalf of appellant disclosed by the present record. It may be that appellant might adequately explain her actions and justify a decision that she had always intended to apply for lot 5. But she has clearly not done so at the present time. It was manifest error for the District Office based on the record before it, to find, as it did, that appellant had, at all times, intended to file on lot 5.

[3] Even if there were no question as to the situs of appellant's claim, if, indeed, she had, since her original application, consistently sought lot 5, we are still at a loss to understand how the District Office could approve this allotment under the 1906 Act. Appellant's own affidavit states that she would "go on the land every summer and stay several days." ^{11/} As a matter of law, mere use of land for a few days each year,

^{11/} Once again, appellant's affidavit corroborates the initial field examination report and contradicts the favorable report. Thus, in the 1977 report, describing the history of land use by the applicant, the examiner stated, "Since 1953, used once a year since 1953 for picking berries." In

absent any physical improvements, does not constitute substantially continuous use and occupancy potentially exclusive of others. Indeed, in our recent decision styled United States v. Estabrook, 94 IBLA 38 (1986), the Board held that use of land as a base camp for hunting twice a year for periods of a few days to a week was not qualifying use "when the claimants failed to prove that their seasonal use of the land was undertaken so as to potentially exclude others who used the land for the same purpose." Id. at 53. Accord Jack Gosuk, 22 IBLA 392 (1975); Gregory Anelon, Sr., 21 IBLA 230 (1975). The use alleged in the instant case is clearly inferior to that shown in Estabrook and, thus, the District Office's finding of qualifying use and occupancy cannot be sustained.

[4] More fundamentally, we note an apparent misinterpretation of the guidelines for adjudication issued by Assistant Secretary Horton on October 18, 1973. Because of the importance we attach to the proper implementation of these guidelines, we set them out in detail:

FIELD EXAMINATION GUIDELINES:

1. Field examinations should take into consideration Native traditional and customary occupancy of land and the way of life of the Native people.
2. Field examiners will accept affidavits from persons claiming knowledge of Native use and occupancy of land being examined and may seek BIA assistance in obtaining such information.

fn. 11 (continued)

the 1983 report under the same heading, no specific quantum of use is given, yet the clear inference is that appellant used the land numerous times in various seasons.

3. In making a determination that a Native has completed five years of substantial use and occupancy, the existence of any of the following evidence may be considered:

- a. House or cabin.
- b. Food cache.
- c. Camp site -- evidence of tent, tent frame or temporary shelter, fire pits, cleared area.
- d. Fish wheel.
- e. Dock or boat landing.
- f. Evidence of fishing, hunting and trapping such as fish drying racks, etc.
- g. Reindeer headquarters and corrals.
- h. Evidence of berry picking, gathering of wild roots, greens and other wild foods.
- i. Other evidence of use should be considered such as animal bones, meat racks, fur caches, stretch boards, sledge dog spots, any sheds or holes, and pits or spots that show human use and occupancy.

Substantial use and occupancy cannot be defined in any more detail than in the regulations.¹ It will depend largely upon the mode of living of the Native. Use and occupancy by an Aleut or an Indian may not be the same as by an Eskimo. Therefore, the customs of the applicant must be considered and applied to the findings to arrive at a conclusion as to whether the land is being used as claimed. Customs of the Natives must be correlated with the physical findings -- improvements, vegetation, evidence of use, climate, and resources on the land, particularly with reference to the claimed use.

The field report must contain an adequate description of the land, its improvements, and observed uses to verify the claimed use. This description should be supported by sketch maps and photos. The field report should clearly describe the areas of use and occupancy.

¹/ Section 2561.0-5(a) of the Regulations provides: The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the Applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

Contrary to the interpretation seemingly espoused in the decision below, these guidelines do not provide support for the conclusion that land used merely as a site for berrypicking, without more, ever qualifies for an allotment. What these standards do provide is that evidence of berrypicking as well as evidence of fishing, hunting, and trapping may be considered in determining the existence of substantially continuous use and occupancy such as would be at least potentially exclusive of others. Allegations of berrypicking and the observed presence of berrypicking areas do not constitute evidence of berrypicking within the meaning of these guidelines. Rather, as is made clear in the case of fishing, hunting, and trapping, where the example of fish-drying racks is provided, or campsites, where the guidelines mention tent, tent frame, temporary shelters, fire pits and cleared areas, it is physical evidence of berrypicking which is relevant.

The reason that physical evidence is required has nothing to do with the veracity of an applicant. Rather, the presence of physical evidence goes to the question of potential exclusivity. Physical evidence serves the purpose of alerting others that land is or might be under the claim of someone else. The mere fact that there are berries growing on a specific parcel of land could scarcely be said to give rise to a reasonable apperception in a third party that the land was claimed by another. But, physical evidence of berrypicking, such as a defined path to the bushes, could be a factor in such a determination. That is what the guideline provides. It states that evidence of berrypicking may be considered in making a determination of whether substantial use and occupancy has occurred.

It does not follow, however, that the mere existence of evidence of berrypicking, without more, justifies the conclusion that substantial use and occupancy potentially exclusive of others has occurred. Standing alone, we find it difficult to conjure up any circumstances in which such a conclusion would be appropriate. It is, however, a relevant factor, when conjoined with other physical indicia, in determining whether an individual on the ground could properly be said to be on notice that the land was claimed by another, and could also serve to delineate the extent of any such claim. Indeed, this is the essential meaning of the phrase "potentially exclusive of others." A claimant need not show that he or she actually excluded others from using the land sought; rather, a claimant must show that the nature of the use was such that, under normal circumstances, any person on the land knew or should have known it was subject to a prior claim. Thus, actual occupancy on the land, or the presence of physical structures and man-made artifacts, such as tent frames and fish drying racks, might well engender a recognition that someone was appropriating the land. No reasonable person would come to a similar conclusion merely because berries had been picked in the area.

In the instant case, we note that, during the period in which appellant has alleged use and occupancy, two different homestead entries were allowed embracing both appellant's and Mary McLean's land. Land was apparently cleared under one of these entries. Not only were these entrymen seemingly unaware of appellant's claimed use of the land, there is no evidence that appellant ever protested these entries as infringing upon her use and occupancy of the land. Yet, appellant maintains that she picked berries on the

land throughout this period. The failure of either to protest the other's actions highlights the fact that picking berries is generally not seen as an act of appropriation and fortifies our conclusion herein. 12/

In view of our conclusions set forth above that the District Office determinations that appellant had always intended to apply for lot 5 and that her use of the land constituted substantially continuous use and occupancy at least potentially exclusive of others are not supported by the record, we must remand the subject case to the District Office with instructions to issue a contest complaint. See John Nusunginya, 28 IBLA 83 (1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Fairbanks District Office is set aside and the case files are remanded with instructions to initiate a contest proceeding in accordance herewith.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Franklin D. Arness
Administrative Judge

12/ We are well aware that our conclusions herein may reflect adversely on actions taken by the Fairbanks District Office, BLM, with respect to other Native allotments in this area. Be that as it may, this Board may no more ignore the requirements of the law in this case simply because others may have improperly been granted allotments, than BLM can ignore the requirements of the 1906 Act in its adjudication of protested allotments, simply because Congress has, by its legislative approval of many unprotested allotments, authorized passage of title to others who might not qualify under the Act. It is the requirements of the law which must guide our and BLM's adjudications.